NO. 86-901

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

LARRY COHRAN,

Petitioner,

vs.

HERBERT A. RIVERS, Solicitor State Court of Cobb County, DAVID ANTHONY, BOB CANADA, and J. LYNN RAINEY,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Larry Cohran
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October 24, 1986

63pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a cause of action is stated under 42 U.S.C. 1983 for the violation of plaintiff's rights, privileges and immunities secured by the Constitution (First Amendment, freedom of speech, assembly, redress and privacy and Fourteenth Amendment, due process and privacy) and laws (42 USCS 3789g) of the United States by the Solicitor and his office personnel because of a "petition" filed by the Solicitor in his effort to circumvent the actions of the Grand Jury of that County in indicting him by chilling the speech and participation of the Petitioner and other members of the Grand Jury in the consideration of indictments against the Solicitor for his misconduct and criminal activity in office by circulating the petition which contained certain convictions of crimes which were

not those of this Petitioner, but of a person with the same name, and copies of a criminal arrest record obtained from the F.B.I. and local police agencies to the news media which were publicized to the public resulting in injuries to the Petitioner and the denial of a hearing or an opportunity for the Petitioner to publicly clear himself, but accomplishing the purpose of the Respondents in keeping Rivers from being indicted?

2) Whether the trial court and court of appeals erred in the dismissal of plaintiff's complaint without consideration of the violation of plaintiff's First Amendment Rights to freedom of speech and freedom of association?

3) Whether the trial court violated plaintiff's First Amendment Rights to freedom of speech by the grant of a "gag" order to keep plaintiff from informing the

public of the violation of trust by this public official and his office?

4) Whether the trial court erred in its ruling that plaintiff had adequate state post deprivation remedies as grounds for the dismissal of plaintiff's complaint?

5) Whether the rule as laid down by Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) that in order to maintain an action for violations of 42 U.S.C. 1985 (2) & (3), class based or racial discrimination must be shown, should not be reexamined by this Court?

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OPINIONS AND JUDGMENT BELOW

The District Court granted a Motion for Summary Judgment based on the premise that Petitioner had adequate post deprivation remedies, therefore, his complaint failed to state a cause of action (A 1) and entered Judgment thereon for the Respondents (A 10). Said Order and Judgment were affirmed on Appeal by the Eleventh Circuit Court of Appeals (A 15) and rehearing was denied (A 16).

The District Court granted a "gag" order to Respondent Rivers (A 12).

JURISDICTION

The order of the United States District Court for the Northern District of Georgia, Atlanta Division, granting defendants' Motion for Summary Judgment was entered on September 25, 1985, (printed in the Appendix A, page A 1 through A 9) and was made the judgment of the court on September 25, 1985. Plaintiff filed a Petition to Clarify And/Or Correct Order and for Reconsideration on October 7, 1985, to which the Court entered an order on October 16, 1985, correcting a "typographical error" and denying all other relief (printed in Appendix A, page A 11). During the pendency of said action the U. S. District Court entered an order dated June 14, 1984 (printed in Appendix A, page A 12 through A 14). A timely filed Appeal made to the

United States Court of Appeals for the Eleventh Circuit was denied on June 12, 1986 (printed in Appendix A, page A 15). A timely filed Petition for Rehearing was denied on July 28, 1986 (printed in Appendix A, page A 16).

The jurisdiction of the Court is invoked pursuant to 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS & FEDERAL & STATE STATUTES

First Amendment, U. S. Const. (Appendix A, page A 25)

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Official Code of Georgia Annotated, 51-5-8 (Appendix A, page A 26 - A 27)

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the Northern District of Georgia, Atlanta Division, requesting a jury trial and alleged a violation and a conspiracy to violate, by the Respondents, the rights, privileges and immunities of Petitioner guaranteed under the laws and Constitution of the United States (specifically Petitioners rights under the First and Fourteenth Amendments to the Constitution of the United States and 42 USC 3789g) while acting under color and authority of State law with jurisdiction vesting pursuant to 28 USC 1343, 42 USC 1983, 42 USC 1985.

The Petitioner is an attorney licensed to practice law in the State of Georgia and at the time of the occurrence alleged in his complaint he had been practicing law for approximately twenty (20) years.

Petitioner had maintained a law practice in Cobb County for approximately ten (10) years and enjoyed a good reputation. Beginning in May of 1980 through September of 1981, Petitioner was appointed to serve as Magistrate Pro Hac Vice by the Magistrate of the State Court of Cobb County on several different occasions. For approximately six months prior to January of 1982, Petitioner had not been called upon by the Magistrate to perform any duties of that office.

The Petitioner was subpoenaed to serve on the January-February, 1982 Term of Grand Jury of Cobb County, Georgia. He was elected foreman of said Grand Jury. As foreman he formed an Efficiency in Government Committee that would take complaints from the public about waste and misuse of government resources. Numerous complaints were made against the Solicitor

of Cobb County, Herbert Rivers, to-wit: 1) Theft of County property; 2) theft of services of County employees; 3) Misuse of County property; 4) Malfeasance in office; 5) Non-feasance in office; 6) "Fixing" and unlawfully refusing to prosecute serious traffic offenses involving DUI, hit and run, habitual violations, etc.; 7) Incompetence; 8) Corruption; 9) Driving the County automobiles while intoxicated; 10) Bribery; and 11) Concealing County records (accusations and evidence).

After Rivers became aware that the Grand Jury was investigating him for possible indictment and more than a month and a half after Petitioner began to serve on said Grand Jury, Rivers filed a sham petition in the Clerk's office of the State Court of Cobb County, for the obstensible purpose of removing Petitioner as Magistrate Pro Hac Vice for certain

criminal charges (misdemeanors) which he attached to said Petition some of which were not only that of Petitioner but of another person with the same name as Petitioner. (These charges were approximately twenty years old, and none were less than ten years old). None of the convictions would have barred Petitioner from serving as Magistrate (nor as a member of the Grand Jury). After filing the petition with the Clerk of the State Court with instructions to not allow Petitioner to obtain a copy, Rivers immediately turned the petition over to the news media along with a criminal arrest record obtained from the F.B.I. which were publicized in the news paper, and on radio and television on daily basis at first and then tapering off to once a week for more than two months. The arrest record was also circulated among the twenty-two

members of the Grand Jury and other public officials.

The first knowledge Petitioner had of the petition was through a phone call from a news paper reporter who had been given the petition and arrest record. Petitioner was only able to obtain a copy of the Petition after obtaining an Order from the Magistrate requiring that a copy of the Petition be served upon the Petitioner.

At a hearing on a Motion to Quash Notices to take depositions of Anthony, Canada and Rivers in March of 1982 (after the Grand Jury term had ended), Rainey contended that Petitioner had no right to a hearing or any notice before his removal as Magistrate Pro Hac Vice and Rivers admitted that the Magistrates' Court had no jurisdiction to rule on Rivers' petition. Because of this statement, the

Court dismissed the case.

Petitioner was never afforded a hearing to defend against the charges made by Rivers in his petition and the Respondents took no further action in seeking to have Petitioner removed as Magistrate Pro Hac Vice.

Because of the actions of Rivers and the other respondents in generating the stigmatizing publicity against Petitioner, Petitioner was never again called upon to serve as Magistrate Pro Hac Vice which the Magistrate stated was due to the publicity generated by Rivers and was forced under pressure to resign as foreman of the Grand Jury and, thereafter, Petitioner was ostracized and was unable to participate in the activities of the Grand Jury.

Further, although the Grand Jury had taken sworn testimony relating to Rivers' activity and was contemplating indicting

Rivers, they declined to do so because of the attack upon Petitioner and publicity which had been generated. As a result of this attack upon Petitioner, he lost clients and was ostracized by his peers.

During discovery Rivers admitted that his actions in this matter were taken in an effort to circumvent the actions of the Grand Jury. Testimony from one of Rivers investigators was that the talk in the Solicitors' office was that Rivers was attempting to get Cohran off of the Grand Jury. Anthony and Canada testified that Petitioner was not nor had ever been the target of any criminal investigation and that they were directed to obtain copies of arrest records, accusations, indictments in the name of Larry Cohran. Anthony and Canada testified that they pointed out to Rainey and possibly Rivers that the Larry Cohran named in some of the

materials might not be Petitioner; however, Rainey testified that he did not make any investigation to determine if the person named in the materials were actually the Petitioner and and did not care if they were or not although he prepared the petition, at the direction of Rivers, and attached the materials to the petition.

Anthony testified that he obtained the F.B.I. criminal history upon the request of Rivers and that he had been by Petitioner's house on at least one occasion. He testified that he and Canada had talked to numerous persons trying to find out all that they could about Petitioner. Mr. Anthony testified that he was familiar with Petitioner's activity as a Magistrate Pro Hac Vice and had never heard any complaints about the way Petitioner had conducted himself and felt

that Petitioner was doing a good job.

After soliciting testimony from Rivers concerning the misconduct complained of and from the other defendants about the activities in the Solicitor's office, Rivers moved the Court for a "gag" order which was granted by the Court.

Respondents moved for Summary Judgment which was granted by the trial court with the same being affirmed on Appeal.

REASON FOR GRANTING CERTIORARI

The entire course of action taken by Rivers and the other Respondents violated the Petitioners' First Amendment rights to freedom of speech and association and his Fourteenth Amendment right to due process of law. The actions of Respondents infringed upon Petitioner's right to privacy and violated the federal statute 42 USC 3789g prohibiting the dissemination of criminal history. The actions of Respondents slandered and libeled Petitioner, caused him to lose business and damaged his personal and business reputation. Petitioner was embarrassed, humiliated, intimidated and stigmatized, all for the purpose of chilling the speech of Petitioner in pursuing the indictment of Rivers. The petition was used a vehicle to get Petitioner off of the Grand Jury, to

silence him and to scare and/or discourage other Grand Jury members from the pursuit of Rivers' indictment--which was successful.

Respondents were never concerned with the removal of Petitioner as Magistrate Pro Hac Vice and this is evident in light of the testimony of Rivers and the other members of his office that Rivers was attempting to circumvent the actions of the Grand Jury and that Rivers was trying to get Cohran off of the Grand Jury and the fact that the matter was never pursued after Rivers informed the Court that it did not have jurisdiction to rule on his "Petition" and the matter was dismissed (this occurring after the January-February 1982 term of the Grand Jury); thereby, denying the Petitioner an opportunity to a hearing at the State level or a public opportunity to clear

his name.

After the institution of this action against Respondents and discovery, Rivers was granted a "gag" order which would keep the public from knowing the corruption to which Rivers had admitted on the grounds that it would embarrass or oppress him and during oral argument, his attorney argued that Rivers was up for re-election as Solicitor of Cobb County and the information contained in the transcripts might hurt his chances of re-election.

CAUSE OF ACTION STATED

Freedom of speech, association and right to seek redress are fundamental personal rights and liberties guaranteed by the First Amendment and protected by the Fourteenth Amendment from invasion by the State. Lovell v. City of Griffin, 383 U.S. 444, 58 S.Ct. 666, 82 L.Ed 949

(1938).

In Rutherford v. Berkeley (1986, CA9 Cal) 780 F2d 1444, the court held that where the challenged government action is of such egregious nature as to constitute deprivation of fundamental due process rights, availability of state court relief does not bar federal relief under 42 USCS 1983, i.e., allegations of unprovoked assault and battery on individual by police officer by throwing individual on ground and repeatedly punching and kicking him, if proved, would be of such an egregious nature so that availability of state court relief would not bar federal relief under Section 1983. Mann v. Tuscon, Dept. of Police, (1986, CA9 Ariz) 782 F2d 790, holds that the availability of state post deprivation remedy does not bar 42 USCS 1983 substantive due process claim.

The Eleventh Circuit Court of Appeals by refusing to issue and opinion and in affirming the District Court (Appendix "A," pages A 1 - 9) in this case has rendered a decision (Appendix "A," pages A 15 - 16) in direct conflict with the Court of Appeals for the Ninth Circuit.

Hagg v. Cuyahoga County, (1985 ND Ohio) 619 F. Supp. 262, the court held that a 42 USCS 1983 action alleging violation of express constitutional rights could be maintained in federal court if action alleged substantive due process violation wherein state actor's conduct is ""abhorrent" or shocks conscience" regardless of available state tort remedies for the action then rises to the level of a constitutional tort; and, Martin v. Afflerbach, (1985, DC Me) 623 F. Supp. 565, wherein the court held that a Section 1983 claim for deprivation

of protected liberty interest under Fourteenth Amendment without due process of law, grounded on the action of a police officer in shooting the plaintiff, could be pursued even though state provided post deprivation tort remedy under which the plaintiff could recover for his loss.

The actions of Rivers and the other Respondents are sufficiently flagrant to come within the guidelines set out in the foregoing cases.

Furthermore, 42 USCS 1983 was intended to provide federal remedy for the violation of one's civil rights arising under the Constitution and laws of the United States and Congress did not impose any procedural prerequisites for the filing of said action. The imposition of a state procedural requirement would diminish the broad remedial purpose intended by Congress.

Although the actions of the Respondents give rise to numerous state tort claims, Petitioner is without any sufficient post deprivation remedy in as much as all of the damages and injuries sustained by the Petitioner because of the actions of these Respondents stems from the filing of the sham petition in the State Court and would not survive summary motions for dismissal pursuant to O.C.G.A. 51-5-8 affording the defense of privilege to pleadings filed in court however false and malicious the charge may be and the same may not be deemed libelous (Set forth in Appendix "A," page A 26-27).

In Wirth v. Surles (1977, CA4 SC) 562 F2d 319, 445 ALR Fed 864, cert den 435 U.S. 933, 55 L.Ed2d 531, 98 S.Ct. 1509), the Court held that a civil rights claim based on 42 USCS 1983 should not be

dismissed for failure to state a claim upon which relief can be granted, unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

And it was held in Brown v. Brienen, 772 F.2d 360 (1983) that a public employer who harassed an employee in order to induce him to give up a substantive constitutional right, such as freedom of speech, would be violating the Fourteenth Amendment and Section 42 USC 1983. Here, the Respondents have essentially done the same thing to accomplish the same result.

Although the trial court recognized that a due process violation had occurred (Appendix "A," page A 6 - 7 : "If the plaintiff's complaint were read to allege cause of action merely for

libel, slander, invasion of privacy, or damage to reputation, the complaint would not state a cause of action under federal law. However, to the extent that the plaintiff's complaint alleges deprivation of any of these rights without due process of law, a cause of action would be stated under 42 U.S.C. 1983.") , it did not take into consideration Petitioner's First Amendment violation claim and went on to erroneously conclude that Petitioner had adequate post deprivation remedies provided by the State available to him; therefore, his complaint failed to state a cause of action under Section 1983.

Where jurisdiction over a federal question can be established in district court, the court also has jurisdictional power to decide state law claims arising from the same nucleus of operative facts.

A governmental attack on one's reputation may infringe constitutionally protected liberty in two respects (1) governmental degradation of one's standing in his community may be a denial of "liberty"; (2) governmental communication of derogatory information to employers may be an attach on "liberty." Sims v. Fox, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975).

WHETHER VIOLATION OF 42 USCS 3789g GIVES RISE TO CAUSE OF ACTION FOR DAMAGES

42 USCS 3789g (Appendix "A," page 21-24) is a United States Statute securing certain rights, privileges and immunities to citizens of the United States concerning the access, dissemination and privacy of criminal history and providing

a fine for the violation of said provision "in addition to any other penalty imposed by law."

42 USCS 1983 gives a right of action to every person who has suffered a deprivation of any right, privilege or immunity secured by the Constitution and "laws" of the United States in which an injury resulted because of said deprivation. The trial court erred in its holding that because said statute provided for a penalty, no private right of action was stated; however, Petitioner requests that this Court examine this rationale and determine whether 42 USCS 1983 implies a right of action for the violation of a federal statute wherein the litigant has sustained injuries as a result of same.

FIRST AMENDMENT VIOLATION BY GAG ORDER

The trial court granted the gag order (Appendix, A 12 - 14) requested by Rivers and enjoined the parties, their attorneys and the court reporters from divulging the content of the depositions and required that they same be sealed. This action by the court denied Petitioner his rights under the First Amendment to freedom of speech and denied the public the right to know about the corruption of one of their elected officials in whom they had reposed their trust. The right of the public to know the true facts about their elected official outweighs the concern that the official will be embarrassed by the revelation of these facts.

RECONSIDERATION OF RULE LAID DOWN CONCERNING 42 USC 1985 (2) & (3)

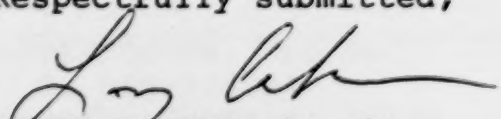
Petitioner believes that the rule laid down by Slavin v. Curry, 574 F.2d 12 56 (5th Cir. 1978) concerning the requirement that a party alleging a violation under 42 USC 1985 (2) & (3) must show class based or racial discrimination in order to maintain suit should be reexamined by this Court. This writer is mindful that this Court prefers to stay out of the business of supervising the State justice system; however, when the State refuses to clean its own house for politics or otherwise, it is incumbent upon this Court to remedy the injustices. And what could be more damaging to the state justice system than to allow a Solicitor of a State Court and his co-conspirators to attack the foreman of a Grand Jury which was considering an

indictment against him and walk away with impunity merely because the Petitioner is not a member of any identifiable class or the action taken was done so because of his race? In this day and time, the Court must realize that "any person" referred to by the Statute should mean exactly that without regard to his race or without regard to any other factor for the criteria is that he be a citizen of the United States.

CONCLUSION

Pettitioner respectfully submits that this Court should grant certiorari for the reasons set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE AND OF MAILING

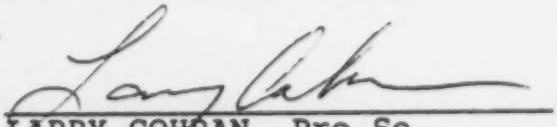
I hereby CERTIFY that I have this day forwarded forty (40) dopies of this Petition to the United States Supreme Court by placing copies of same in a properly addressed package to:

Clerk of the Supreme Court
of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

and copies to counsel for Respondents, to -wit:

Mr. David P. Hartin
Sams, Glover & Gentry
222 Washington Avenue
Marietta, Georgia 30060

by depositing same in the United States Mail, first class, this 27th day of October, 1986.



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The plaintiff is an attorney at law, licensed to practice in the State of Georgia. On May 6, 1980, the plaintiff was appointed magistrate pro hac vice by Judge Ray B. Gary, Jr., who at that time was a duly elected magistrate of Cobb county. Because of a change in the law, that appointment was later withdrawn; however, the plaintiff was reappointed on January 9, 1981, and again reappointed on SEPTEMBER 23, 1981.

the factual allegations in the complaint and the relief sought are directed at Mr. Rivers and not at the office of solicitor, despite the fact that Mr. Rivers is sued in his official capacity. In view of the court's disposition of the case, the court finds it unnecessary to determine whether Mr. Rivers should have been sued in his individual capacity or in his official capacity.

2 The plaintiff also sued "Does 1-20" but those fictitious defendants have never been named, nor have they been served. Since these fictitious defendants have never been properly before the court, the court's disposition of the named defendants' motion for summary judgment disposes of all claims before the court and concludes this action.
September 23, 1981.

The plaintiff was subpoenaed to serve as a member of the January-February 1982 term of the Cobb County grand jury and was elected foreman of the grand jury. As a project of the grand jury, the plaintiff formed an Efficiency in Government Committee, which began an investigation into Mr. Rivers' conduct of his office.

In early 1971, Mr. Rivers and Mr. Rainey, assisted by Mr. Anthony and Mr. Canada in the solicitor's office, began an investigation of the plaintiff arising out of allegations that he had used his position as magistrate to reduce the bonds of two persons whom he was also representing in his capacity as a private attorney. During the course of this investigation, the defendants discovered several criminal convictions of a Larry Cohran.

On February 17, 1982, Mr. Rivers

filed a petition to remove Larry Cohran as magistrate pro hac vice, setting forth in that petition the various criminal conviction which have been discovered together with other allegations of misconduct. Although the plaintiff in this case does not contest the fact that some of those criminal convictions are his, he does allege that two of those convictions were of a different Larry Cohran.

Information regarding the criminal convictions was given to the district attorney of Cobb County, various police chiefs, and the news media. Information was also given to the grand jury of which the plaintiff was foreman, and the plaintiff subsequently resigned as foreman of the grand jury.

Although this court makes no finding as to whether the plaintiff's grand jury

investigation into Mr. Rivers' conduct was the result of Mr. Rivers' investigation of him or whether Mr. Rivers' filing of the petition to remove the plaintiff as magistrate pro hac vice was occasioned by the grand jury's investigation of his conduct, the sequence of events makes it highly unlikely that all of these actions were taken independent of each other.

In his complaint the plaintiff alleges that the actions of the defendants embarrassed, humiliated, intimidated, libeled, and slandered him. He further alleges that the actions of the defendants constitute malicious use and malicious abuse of process. The plaintiff also contends that Mr. Rivers used his office staff to investigate and spy upon him and that the defendants continuously communicated with the news media in an effort to damage his reputation.

As to the plaintiff's claim under 42 U.S.C. 1985, it is clear that the complaint fails to state a cause of action. Subsection 1 of section 1985 clearly is inapplicable to this action, and subsection 2 and 3 both require racial or class-based discrimination. Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978). The plaintiff recognizes that he has not met this requirement but urges this court "to reconsider this ruling." This court is without authority to "reconsider" binding precedent from the Fifth Circuit; it is the Court of Appeals, not this court, that must reconsider the holding in Slavin.

If the plaintiff's complaint were read to allege causes of action merely for libel, slander, invasion of privacy, or damage to reputation, the complaint would not state a cause of action under federal

law, for these are rights secured by state law, not federal law. However, to the extent that the plaintiff's complaint alleges deprivation of any of these rights without due process of law, a cause of action would be stated under 42 U.S.C. 1983. Nevertheless, the plaintiff has not met his burden of showing that there is not an adequate state process available for the vindication of the alleged deprivation of these rights, as required by Hudson v. Palmer, ____U.S.____, 104 S.Ct. 3194 (1984). In fact, Georgia law does provide remedies for the deprivation of these rights. Since the state does provide meaningful post deprivation remedies, the complaint fails to state a claim under section 1983.

In his brief in opposition to the defendants' motion for summary judgment, the plaintiff for the first time alleges

that the defendants violated 42 U.S.C. 3789g, which prohibits the dissemination of criminal history collected, stored, or disseminated through certain agencies and programs supported by federal funds. However, 42 U.S..C. 3789(d) specifically provides, "Any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law." The code section upon which the plaintiff relies contained its own enforcement provision, and this court holds that there is no implied private right of action under that code section.

For the foregoing reasons, the court finds that the plaintiff's complaint fails to state a claim; consequently, the defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 25th day of September, 1985.

/_____
ROBERT L. VINING, JR.
United States District Judge

Filed in Clerk's Office U.S.D.C. Atlanta

September 25, 1985

LUTHER D. THOMAS, Clerk

Judgment entered September 25, 1985.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

LARRY COHRAN, Docket No. C83-303A

vs.

HERBERT A. RIVERS, et al.,

Judge Honorable Robert L. Vining, Jr.

Decision by Court. This action came for consideration before the Court with the judge named above presiding. The issues have been and a decision has been rendered. granting defendant's motion for Summary Judgment.

IT IS SO ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed and that defendants HERBERT A. RIVERS, Solicitor, State Court of Cobb County, DAVID ANTHONY, BOB CANADA, and J. LYNN RAINEY recover of plaintiff LARRY COHRAN cost of action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LARRY COHRAN, *

Plaintiff, *

vs. * CIVIL ACTION
NO. C83- 303A

HERBERT A. RIVERS, *
et al.,
*

Defendants. *

O R D E R

The plaintiff's petition to correct and reconsider the court's order of September 25, 1985, is granted to the extent that the typographical error in paragraph 3 of page 2 is corrected by changing "1971" to "1981." In all other respects the motion is DENIED.

SO ORDERED, this 15th day of October, 1985.

/_____
ROBERT L. VINING, JR.
United States District Judge

Entered October 16, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LARRY COHRAN, *

Plaintiff, *

vs. * CIVIL ACTION
NO. C83-303A

HERBERT A. RIVERS, *
et al.,
*

Defendants.
*

O R D E R

Defendant Herbert A. Rivers has moved for a protective order requiring that the transcript of his deposition, which was conducted on October 5, 1983, and on March 29-30, 1984, be sealed immediately upon being transcribed and be opened only by order of the court and that all parties to their action and their respective counsel and the person taking the deposition be enjoined from disclosing to anyone Mr. Rivers' deposition on the

grounds that the testimony was elicited only to annoy, embarrass, or oppress Mr. Rivers. On April 3, 1984, the court entered a preliminary order granting the motion but allowing the plaintiff ten days from that date in which to respond to the motion.

The court has carefully considered the briefs of the parties and finds pursuant to Rule 26(c), Federal Rules of Civil Procedure, that Mr. Rivers has shown good cause necessitating an order protecting him from annoyance and embarrassment. See International Products Corp. v. Koons, 325 F.3d 403 (2d Cir. 1963). Consequently, the motion for protective order is GRANTED and the transcripts of the deposition and the court reporters' notes are ordered sealed until further order of this court; furthermore, all parties to the action and

their respective counsel and the court reporters are enjoined from disclosing to anyone the contents of Mr. Rivers' deposition.

SO ORDERED, this 13th day of June, 1984.

/Robert L. Vining, Jr.
United States District Judge

Entered June 14, 1984.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8854
Non-Argument Calendar

LARRY COHRAN,

Plaintiff-Appellant,

vs.

HERBERT A. RIVERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(June 12, 1986)

Before RONEY and HATCHETT, Circuit Judges,

and HENDERSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

Judgement Entered: June 12, 1986
For the Court: Spencer D. Mercer, Clerk
BY: Warren A. Godfrey, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8854
Non-Argument Calendar

LARRY COHRAN,

Plaintiff-Appellant,

vs.

HERBERT A. RIVERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING
(July 28, 1986)

Before RONEY and HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM: The petition(s) for rehearing filed by Appellant, Larry Cohran is denied.

Judgement Entered: July 28, 1986
Entered For the Court: /Paul H. Roney
United States Circuit Judge

UNITED STATES STATUTES

TITLE 42 USCS 1983, Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TITLE 42 USCS 1985. Conspiracy to interfere with civil rights.

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more

persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of

any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any

right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USCS 3789g. Confidentiality of information.

(a) Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings. Except as provided by Federal law other than this title, no officer or employee of the Federal Government, and no recipient of assistance under the provisions of this title shall use or reveal any research or statistical information furnished under this title by any person and identifiable to any specific private person for any

purpose other than the purpose for which it was obtained in accordance with this title. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial legislative, or administrative proceedings.

(b) Criminal history information; disposition and arrest data; procedures for collection, storage, dissemination, and current status; security and privacy; availability for law enforcement, criminal justice, and other lawful purposes; automated systems: review, challenge, and correction of information. All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent

feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Assistance, Research, and Statistics shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated systems is inaccurate, incomplete, or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and

to obtain copy of it for the purpose of challenge or correction.

(c) Criminal intelligence systems and information; prohibition against violation of privacy and constitutional rights of individuals. All criminal intelligence systems operating through support under this title shall collect, maintain and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Assistance, Research, and Statistics and which are written to assure that the funding and operation of these systems furthers the purpose of this title and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

(d) Violations; fine as additional penalty. Any person violating the provisions of this section, or of any

rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law.

UNITED STATES CONSTITUTIONAL AMENDMENTS

AMENDMENT I, Freedom of Religion, of Speech, and of the Press.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

AMENDMENT XIV, Section 1., Citizenship Rights Not to Be Abridged by States.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA STATUTES

OFFICIAL CODE OF GEORGIA ANNOTATED, 51-5-8. Absolute privilege of allegations, etc., in pleadings.

All charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However false and

malicious such charges, allegations, and averments may be, they shall not be deemed libelous. (Civil Code 1895, Section 3842; Civil Code 1910, Section 4438; Code 1933, Section 105-711.)

86-901

NO. _____

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

LARRY COHRAN,

Petitioner,

vs.

HERBERT A. RIVERS, Solicitor State Court of Cobb County, DAVID ANTHONY, BOB CANADA, and J. LYNN RAINEY,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Garvis L. Sams, Jr.
Sams, Glover & Gentry
49 Atlanta Street
Marietta, Georgia 30060
(404) 422-6502

RESPONDENTS' STATEMENT REGARDING QUESTION PRESENTED FOR REVIEW

Respondents contend that this case presents no questions for review by this Court as the district court relied upon binding precedent from this Court and federal courts of appeals which are not in conflict with other courts of appeals. The Eleventh Circuit Court of Appeals, recognizing this, affirmed the ruling of the district court without opinion, pursuant to Circuit Rule 25.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is largely conclusory and argumentative and unsupported by the record. Respondent would refer the Court to that statement of the case set forth in the district court's order and included in Appendix "A" to the Petition at pages A1 through A5. That statement is complete and accurate and contains everything that is material to the consideration of this matter.

SUMMARY OF ARGUMENT

There is no reason to grant review on writ of certiorari in this case. The district court order granting summary judgment to the respondents, which was affirmed without opinion by the Eleventh Circuit Court of Appeals, was based upon binding legal precedent.

Petitioner's claims did not set forth a cause of action under 42 U.S.C. §1983, 42 U.S.C. §3789g or 42 U.S.C. §1985(2) or (3), and the district court properly exercised its inherent, discretionary power in granting the protective order.

ARGUMENT

I. CONSIDERATIONS GOVERNING REVIEW

Rule 17 of this Court, titled "Considerations Governing Review on Certiorari" provides litigants guidance as to reasons that will be considered by this Court in granting review on writ of certiorari.

Reasons applicable to this case would include:

> "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Rule 17.1(a)

and

> "When a state court or a federal court of appeals has decided an important question of federal law which has not been, but

should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Rule 17.1(c)

None of those reasons are present in this case.

II. THE ELEVENTH CIRCUIT'S AFFIRMANCE DID NOT CONFLICT WITH THE NINTH CIRCUIT

Petitioner argues that the Eleventh Circuit Court of Appeals, by affirming the district court without opinion, is in conflict with the Ninth Circuit Court of Appeals decisions in Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) and Mann v. City of Tucson, 782 F.2d 790 (9th Cir. 1986). In both of those cases, the Eleventh Circuit found that the state defendant's conduct was so egregious that it violated the plaintiff/victim's right to substantive due process. In each of these cases, the state defendants had clearly acted in an unlawful manner toward the victims. In Rutherford, police

officers had beaten the plaintiff without provocation. In Mann, police officers had conducted two unlawful searches of the plaintiff's residence.

In the instant case, the Petitioner alleges that:

> "[T]he actions of the defendants embarrassed, humuliated, intimidated, libeled and slandered him. He further allege[d] that the actions of the defendants constitute malicious use and malicious abuse of process. The Plaintiff also contends that [Defendant] Rivers used his office staff to investigate and spy upon him and that the defendants continuously communicated with the news media in an effort to damage his reputation."

September 25, 1985 Order of the United States District Court, Northern District of Georgia, Civil Action No. C83-303A, in Appendix to Petition for Writ of Certiorari at Page A5.

The district court found that the Complaint failed to state a cause of action under 42 U.S.C. §1983, as it merely alleged causes of action for libel, slander, invasion of privacy or damage to reputation.

The court went further to hold that even if the complaint had alleged that the defendants had deprived the petitioner of any of his rights without due process of law, a claim would not be stated under 42 U.S.C. §1983 because state law provides adequate remedies for such deprivations. (Appendix to Petition for Writ of Certiorari, page A7.)

The Petitioner did not argue to the district court or the court of appeals that the defendants' conduct violated his right to substantive due process, nor was there any reason for either of those courts to find a substantive due process violation. The alleged conduct of the defendants in the instant case fell far short of that found by the Rutherford and Mann courts. It follows that the Eleventh Circuit Court of Appeals was not in conflict with the Ninth Circuit in rendering its Order in this appeal.

III. 42 U.S.C. §3789g CREATES NO PRIVATE CAUSE OF ACTION

Petitioner argues that he had a cause of action under 42 U.S.C. §3789g for the alleged improper dissemination of his criminal record. Petitioner has failed to cite any authority for this argument, and Respondents submit that none exists, as this statute contains its own enforcement provision.

IV. THE PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S INHERENT POWERS

Petitioner argues that the Protective Order entered by the district court on June 14, 1984, (Appendix to Petition for Writ of Certiorari, pages 12 through 14) is an improper "Gag Order". A trial court has jurisdiction to enter protective orders and limit the use and disclosure of information obtained through discovery under its inherent "equitable powers . . . of

law over (its) own process, to prevent abuses, oppression and injustices." Gumbel v. Pitkin, 124 U.S. 131, 144, 8 S.Ct. 379, 31 L.Ed. 374 (1888). This is exactly what the district court did in 1984, when it entered this protective order, and no reason exists now to overturn that exercise of the court's inherent discretionary power.

V. THERE IS NO REASON TO RECONSIDER THE CONSTRUCTION OF 42 U.S.C. §1985

Petitioner asks the Court to reconstrue 42 U.S.C. §1985(2) and (3) so that it will apply to him.

Section 1985(2) applies where two or more persons have deterred a "party or witness in any court of the United States from attending court" or testifying, and thus it has no application to this action.

Section 1985(3), as construed by this Court, requires that "some racial,

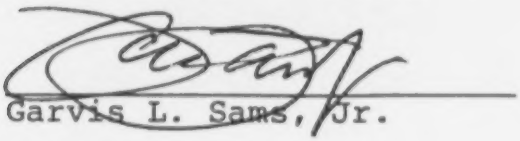
or perhaps otherwise class-based invidiously discriminatory animus (must lie) behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 (1971). There is absolutely no reason to reconsider this construction of 42 U.S.C. §1985(3), which was followed by the Fifth Circuit Court of Appeals in Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), the case relied upon by the district court in dispensing with this claim.

CONCLUSION

For the reasons set forth in the within and foregoing Brief in Opposition to Petition for Writ of Certiorari, this Court should deny the writ.

Respectfully submitted,

SAMS, GLOVER & GENTRY



Garvis L. Sams, Jr.

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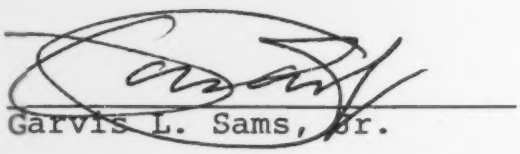
CERTIFICATE OF FILING AND SERVICE

This is to certify that I received the Petition for Writ of Certiorari on November 4, 1986, and that within thirty (30) days afer receipt of the petition, I have filed with the Clerk of this Court forty (40) printed copies of this opposing brief by depositing same in a United States post office, with first-class postage prepaid, properly addressed to:

Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

This 4TH day of December, 1986.



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I have served one copy of this opposing brief on opposing counsel by depositing same in the United States mail, with first-class postage prepaid, properly addressed to:

Larry Cohran
P. O. Box 724054
Atlanta, Georgia 30339

This 4TH day of December, 1986.

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